S. MARIAPPAN

v.

THE GOVERNMENT OF MALAYSIA

FEDERAL COURT, KUALA LUMPUR
WAN SULEIMAN FJ
ABDUL HAMID OMAR FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 108 OF 1982]
10 AUGUST 1983

LABOUR LAW: *Employment - Dismissal - Whether void - Whether wrongful exercise of power of dismissal - Jurisdiction.*

CIVIL PROCEDURE: *Appeals - Point or issue presented for first time - Whether should be allowed - Duty of appellate Court.*

The appellant employed in the permanent pensionable service of the Government of Malaysia as a clerical officer attached to the Telecoms Department was dismissed from service by the Public Services Commission ("PSC") on the ground that he failed to comply with a particular Treasury Instruction. The appellant appealed, solely relying on a point of law neither raised nor pleaded in the lower Court. His contention was that the disciplinary authority for the purpose of the appellant's category was the Public Services Disciplinary Board and not the PSC Board and that therefore the exercise of power of dismissal was wrong and the dismissal void. It was submitted by the appellant that at the relevant time the Disciplinary Board Regulations, 1972, PU(A) 48 ("the Regulations") and that by virtue of Articles 144(5B)(i) and (iv) the power to take disciplinary action against him was vested in the Board pursuant to reg. 3(1) and (2) of the Regulations.

Held:

[1] The Court in the exercise of its discretion and in the interests of justice would allow the point to be argued before it. The facts in the case were not dispute. The point raised was not merely technical but essentially one of jurisdiction. A point not taken in the lower Court will not be allowed to be argued unless the appellate Court is satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would support the new plea. (*United Marketing Co. v. Hasham Kara* [1963] MLJ 261; *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55).

[2] The PSC had acted properly and within its jurisdiction when it exercised the disciplinary powers of dismissal over the appellant. The Board did have jurisdiction as provided by reg. 3(1) of the Regulations to exercise a disciplinary function over all persons including the appellant, who were members of the services mentioned in (c) and (f) of Clause (1) of Article 132 of the Federal Constitution as specified in the First Schedule. Regulation 3(1) is however made subject to reg. 3(2) and the Board did not have the necessary authority to exercise disciplinary powers of dismissal and of certain other matters over the appellant, who did not come under the Sub-ordinate and Manual Group provided by reg. 3(1) but the Clerical and Technical Group, over which the disciplinary power of dismissal was still vested in the PSC.

[Appeal dismissed.]

Cases referred to:

Innaya v. Lombard Acceptance (M) Ltd. [1963] MLJ 30
United Marketing Co. v. Hasham Kara [1963] MLJ 261

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 MLJ 236
Tan Tek Yan v. Samuel [1964] MLJ 283
Lim Chui Lai v. Zero Limited [1964] MLJ 314
The "Tasmania" [1980] 15 AC 227
Gulwant Singh v. Abdul Khalik [1965] 2 MLJ 55
Connecticut Fire Insurance v. Kavanagh [1892] AC 473
Ang Hua Bee v. Leong Miaw Yu [1969] 1 MLJ 192

Legislation referred to:
Disciplinary Board Regulations 1972, reg. 3(1), (2)
Federal Constitution, arts. 132(1)(c), (f), 144(5B)(i), (iv)

Other source referred to:
Supreme Court Practice Mallal's p. 917

For the appellant - Karpal Singh; M/s. Adnan Sundra & Low
For the respondent - P.M. Mahalingam, SFC

JUDGMENT

Abdul Hamid Omar FJ:

The appellant S. Mariappan employed in the permanent pensionable service of the Government of Malaysia as a clerical officer attached to Telecoms Department was dismissed from service by the Public Services Commission (PSC) on 7 August 1972 on the ground that he failed to comply with Treasury Instruction 78(a) which requires daily collection exceeding RM500 (for currency notes and coins) and RM2,000 (for cheques and postal orders) in addition to cash, to be deposited within a prescribed time in a local bank. The PSC found as a fact that this failure to comply was in regard to a sum of RM5,076.63 from a total collection of RM16,998.04 for period between 27 September 1969 to 2 January 1970.

These facts are not challenged before us on appeal. The sole ground raised upon which the appellant relies revolves on a point of law not raised in the lower Court as follows:

> 3. The Learned Trial Judge should have held **that the Disciplinary Authority for the purpose of the appellant category was the Public Services Disciplinary Board** and not the Public Services Commission and should have held that the exercise of power of dismissal by the Public Services Commission was wrong and that the purported dismissal was therefore void and of no effect.

Mr. Karpal Singh Counsel for the appellant has urged the Court to exercise its discretion to allow this point not raised before to be argued as it is vital to the appellant's case.

The principles on which the Court of Appeal will permit a point of law not raised in the Court below to be raised on appeal can be found in a number of authorities. As a starting point we refer to a passage in *Mallal's Supreme Court Practice* at p. 917 under the heading "Points not taken in Court below." The principle that emerges from the authorities, fundamentally, is that the Court of Appeal will not consider an issue which has not been raised before, particularly on a point not argued in the Court below and which did not appear specifically in the pleadings. The propriety of allowing such point to be raised is also doubted where it is highly technical and devoid of merit. Cases decided after 1962 confirm that a ground of appeal not pleaded in the lower Court is not open to the appellant (*Innaya v. Lombard Acceptance (M) Ltd.* [1963] MLJ 30). In a Privy Council case of *United Marketing Co. v. Hasham Kara* [1963] MLJ 261 it is stated that point not taken in the lower Court will not be allowed to be argued unless it is satisfied that the evidence on which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would support the new plea. It is also stated that even if the facts are beyond dispute they would not readily

allow a fresh point of law to be argued without the benefit of the judgment of the Judges in the Court below. (See also *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 236).

A further authority on the principle followed by an appellate Court in dealing with a point not taken at the trial may be found in *Tan Tek Yan v. Samuel* [1964] MLJ 283 where it is held that a point, not taken at the trial, and presented for the first time in the appellate Court ought to be most jealously scrutinised and an appellate Court ought only to decide in favour of the appelant on a ground there put forward for the first time, if it be satisfied beyond any doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial. (See also *Lim Chui Lai v. Zero Limited* [1964] MLJ 314). (See also *The "Tasmania"* [1890] 15 AC 227).

In *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55 Thomson LP delivering the judgment of the Court referred to *The "Tasmania"* and went on to say that:

> The question of whether effect should be given to a point not raised at the trial and which is raised for the first time in the appellate Court is one for discretion and the principles on which that discretion will be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance v. Kavanagh* [1892] AC 473, 480 as follows:
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> > When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

In another case *Ang Hua Bee v. Leong Miaw Yu* [1969] 1 MLJ 1192, also on a similar point, it was laid down that although as a general rule a point not raised in the Court below cannot be considered on appeal but in cases relating to jurisdiction of the Court to order possession, the fact that the point was not taken in the Court below does not preclude the tenant from relying on it.

In the present case the facts are not in dispute. The point raised cannot be said to be merely technical but is related to jurisdiction to be determined by reference to certain provisions of the Constitution and Service Regulations. There is no question of fact that calls for determination. On the evidence disclosed the appellant's contention rests solely on whether the proper body vested by law to exercise disciplinary authority over the appellant was the Public Services Disciplinary Board or the Public Services Commission. The question is, therefore, essentially one of jurisdiction. If we should hold in favour of the appellant, it would necessarily mean the Public Services Commission had acted *ultra vires* and the validity and effect of the dismissal would accordingly be open to question. We therefore feel that in exercise of our discretion, indeed we consider it expedient in the interests of justice, that this point, although not taken in the Court below and was not pleaded, should be allowed to be argued in this Court.

It is submitted by the appellant that at the time when he was asked to show cause (11 January 1972) (appendix C p. 15 of Part III of the Record), the disciplinary authority was not the PSC but the Disciplinary Board constituted under the Disciplinary Board Regulations 1972, PU(A)

48, (we call the Regulations), effective from 1 January 1972. It is also submitted that by virtue of Article 144(5B)(i) and (iv) the power to take disciplinary action against him was vested in that Board pursuant to reg. 3(1) and (2) of the Regulations.

For ease of reference we have set out hereunder Article 144(5B)(i) and (iv) of the Federal Constitution and also reg. 3 of the Public Services Disciplinary Board Regulations 1972:

> (5B)(i) Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first appointment to the permanent or pensionable establishment, may be exercised by a board appointed by the Yang di-Pertuan Agong.
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> (iv) Where the Yang di-Pertuan Agong has appointed the Board under para. (i) of this Clause for the purpose of exercising any of the powers or functions referred to under that paragraph, such power or functions to be exercised by the Board, cease to be exercisable by the said Commission.
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> 3(1) Subject to para. (2) the Board shall have jurisdiction and shall exercise its functions in matters relating to discipline over all persons who are members of the services mentioned in paras. (c) and (f) of Clause (1) of Article 132 of the Federal Constitution as specified in the First Schedule except in respect of those officers officiating or acting in the posts of the Chief Secretary to the Government and the Director General, Public Services.
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> (2) No Board other than the Board which has jurisdiction over the subordinate staff in the Subordinate and Manual Group shall exercise the disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment.

It is further submitted that as at that date (11 January 1972) the Public Services Commission ceased to be the disciplinary authority. Mr. Karpal Singh refers to reg. 17 which he submits supports his contention. Regulation 17, a saving and transitional provision, provides that:

> (i) Nothing in these Regulations shall affect any act done or proceedings commenced by the Public Services Commission before the commencement of the Regulations repealed by reg. 16 or by the Disciplinary Board before the commencement of these Regulations: and all such acts and proceedings shall be deemed to have been done or commenced by the Board or an Appeal Board as if these Regulations had been in force.
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> (2) Nothing in these Regulations shall be deemed to affect or take away any of the powers, privileges or protection conferred upon or accorded to the Public Services Commission or any member thereof under the Services Commissions Ordinance 1957.

It is the appellant's contention that the operative words there are the words "proceedings commenced", and in so far as they relate to him proceedings commenced with the show-cause letter that was sent to him on 11 January 1972. Since it was commenced by the PSC after the coming into force of the Regulations, reg. 17 cannot therefore be invoked to save the power of the PSC and on that ground alone, this appeal should be allowed. Reference is made to reg. 17(3) which we do not see how it could support the appellant's contention. On the contrary it supports the respondent's case covering the re-classification under Pekeliling Perkhidmatan Bil. 7 Tahun 1970. We will come to that shortly. Again for ease of reference we reproduce reg. 17(3) which reads:

> (3)Any disciplinary proceedings in respect of an officer commenced by a Disciplinary Board before the commencement of these Regulations may be disposed of by that Disciplinary Board notwithstanding the re-classification of such officer under the Pekeliling Perkhidmatan Bil. 7 Tahun 1970 or Pekeliling Perkhidmatan Bil. 7 Tahun 1971 and the provision of reg. 2 or 3 as the case may require, and the Disciplinary Board shall have all the powers of the Board constituted under these Regulations.

Now, Mr. Mahalingam, Senior Federal Counsel appearing on behalf of the Government of Malaysia submits that the appellant belonged to Group C - Clerical and Technical - in the general public service of the Federation covered by Article 132(1)(c) of the Federal Constitution. He also submits that this group does not come under the category of the subordinate staff in the subordinate and manual group. We agree, paragraph 20 of Service Circular No. 7 of 1970 which deals with the classification of officers abolished the classification system and substituted therefor groups A, B and C based on the maximum salary in a salary scale effective from 1 January 1970 and the appellant was placed under Group C - Kumpulan Pekeranian dan Teknik (Clerical and Technical Group).

The question now before us is whether the PSC ceased to have disciplinary authority over the appellant upon the establishment of the Disciplinary Boards under reg. 2 of the Regulations whose members were specified in the First Schedule. The answer to the question is, in our view, to be found in reg. 3(2). While reg. 3(1) provides that the Board shall have jurisdiction and shall exercise its functions in matters relating to discipline over all persons who are members of the services mentioned in paras. (c) and (f) of Clause (1) of Article 132 of the Federal Constitution as specified in the First Schedule, it is however made subject to reg. 3(2) which directs that the Board shall not exercise the disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment **except the Board which has jurisdiction over the subordinate staff in the Subordinate and Manual Group.** (The emphasis is ours). As the appellant did not come under the Subordinate and Manual Group but the Clerical and Technical Group, that Board that was established to have jurisdiction and to exercise functions over persons referred to earlier (reg. 3(1)), (the appellant included) was not therefore by law vested with the necessary authority to exercise disciplinary powers of dismissal, reduction in rank, reduction of salary or deferment of increment over the appellant. At the relevant time such power was still vested with the PSC.

For reasons stated, it is our view that the PSC had acted properly and within its jurisdiction when it exercised the disciplinary powers of dismissal over the appellant. Accordingly we dismissed this appeal with costs.

Also found at [1983] 2 CLJ 124